MOHD SHAHRIL ABDUL RAHMAN v. AHMAD ZULFENDI ANUAR

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[CIVIL APPEAL NO: AA-12BNCvC-2-01-2020]
14 JUNE 2021

ROAD TRAFFIC: *Accident – Liability – Accident between motorcar and motorcycle – Apportionment of liability at 70:30 – Motorcycle rider without driving licence, road tax and policy of insurance against third party risks – Whether contumacious disregard for law – Whether conduct of motorcycle rider illegal – Whether could be afforded protection under law – Whether motorcycle rider contributorily negligent – Whether apportionment of liability to be varied – Road Transport Act 1987, s. 90*

TORT: *Negligence – Contributory negligence – Accident between motorcar and motorcycle – Liability – Apportionment of liability at 70:30 – Motorcycle rider without driving licence, road tax and policy of insurance against third party risks – Whether contumacious disregard for law – Whether conduct of motorcycle rider illegal – Whether could be afforded protection under law – Whether motorcycle rider contributorily negligent – Whether apportionment of liability to be varied – Road Transport Act 1987, s. 90*

DAMAGES: *Personal injury – Loss of future earnings – Whether person injured receiving earnings by own labour or other gainful activity before injury – Whether credible evidence produced – Whether inference ought to be drawn in absence of evidence – Whether entitled to loss of earning capacity – Whether could work with recommended follow-up treatment – Whether there was evidence of real and substantial loss – Civil Law Act 1956, s. 28A(2)(c)(i) & (ii)*

This was an appeal by the appellant ('defendant') and a cross-appeal by the respondent ('plaintiff') against the whole of the decision of the Sessions Court Judge ('SCJ') in a running down claim. The plaintiff's version was that on 5 July 2018, at about 2am, while riding on his motorcycle from the Tapah Road towards Langkap and upon reaching the 30 KM mark of Jalan Langkap - Kampar, he stopped at a T-junction. After ensuring there were no vehicles from the direction of Kampar, he came out of the junction. However, after he came out, and while he was on the main road to Langkap, the defendant, who was driving a motorcar and travelling in the direction of Kampar, suddenly, at a great speed, made a U-turn in the opposite direction, entered the plaintiff's right of way, and collided with the front right part of the plaintiff's motorcycle causing the plaintiff to fall and suffer (serious) injuries. The plaintiff thus claimed that the accident was caused wholly and or substantially by the negligence of the defendant. On the other hand, the

defendant, stating that the accident was caused wholly by the plaintiff and/or contributed by the negligence of the plaintiff himself, denied making any U-turn. The defendant stated that he was driving straight heading towards Langkap/Teluk Intan from Kampar when the plaintiff suddenly came out of the junction, without first stopping to ascertain that it was safe to do so, and rode into the defendant's right of way, causing the defendant to collide with the plaintiff without any opportunity to prevent the accident. The Sessions Court Judge ('SCJ') accepted the plaintiff's version and held that the defendant was 70% to blame for the ensuing accident. The SCJ also found that the accident would not have occurred but for the contributory negligence of the plaintiff for riding his motorcycle too fast, and therefore found that the plaintiff was contributorily negligent and hence, 30% liability was apportioned onto the plaintiff. This court, whilst agreeing that the accident was, in the main, caused by the defendant and the SCJ's apportionment of liability at 70:30 premised upon the evidence was fair, was called upon to determine the question of whether, in a running down action, the plaintiff, who at the time of the accident, had no driving licence, motor vehicle licence (or commonly known as road tax) and policy of insurance against third party risks, could be entitled to any relief from the court.

Held (allowing appeal; varying decision of Sessions Court):

(1) No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act is a principle that is applicable to all causes of action including claims in tort. At the time of the accident, the plaintiff had no licence to ride a motorcycle and the motorcycle he was riding had no road tax and insurance. He had been riding a motorcycle for at least eight years without a licence despite knowing that it was against the law. Therefore, the court was driven to infer that the plaintiff was wilfully indifferent to the dictates of the legal requirements for riding a motorcycle on the road. (paras 35, 37 & 54)

(2) Applying the test in *Patel v. Mirza*, the court considered (i) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim. The prohibitions that the plaintiff had contravened in this case were: (a) using a motor vehicle without having in force a policy of insurance in respect of third party risks in contravention of s. 90 of the Road Transport Act 1987 ('RTA'); (b) driving a motor vehicle without a driving licence authorising him to drive a motorcycle in contravention of s. 26 of the RTA; and (c) using a motor vehicle in respect of which there was not in force a motor vehicle licence, or what is commonly known as 'road tax' in contravention of s. 15 of the RTA; (ii) any other relevant public policy on which denial of the claim may have an impact. A denial of such a

claim, in whole or in part, would serve the public policy that there will be no free lunch. It will serve to instil a sense of responsibility to drive all to be armed with a mentality that laws are to be always obeyed; and (iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. (paras 54, 55, 58 & 59)

(3) The rationale for all motor vehicles to be insured, at least, as against third party liability whilst on the road is clear. Accidents can and do happen whilst using the road whether through one's own negligence or otherwise. The danger and damage that would be caused by a motor vehicle to other road users are very real. Should any injury or damage be caused or suffered, the wrongdoer may not be able to pay for the same and hence, the need for every road user using a motor vehicle to be first armed with an insurance policy against any third party risks. Any claimant who wilfully uses a motor vehicle without insurance should not be entitled to relief should he or she suffer any accident. (paras 50 & 52)

(4) The plaintiff, by having no policy of insurance on foot for his motorcycle at the time of the accident, no motor vehicle licence and with him riding a motorcycle with no driving licence at all for at least eight years, showed his contumacious disregard for the law. In the greater interest of the law, the liability of the plaintiff was to be increased by 30%. In the upshot, liability as between the plaintiff and the defendant was apportioned at 40:60. Therefore, although the defendant was principally to be blamed for the tort of negligence leading to the accident, the liability to be apportioned to the defendant may exceed 50% by reason of, *inter alia,* contributory negligence on the part of the defendant (paras 60, 61, 63 & 64)

(5) In determining loss of future earnings, there must be evidence of a real and substantial loss which must not be remote and speculative. There was no credible evidence produced to prove that the plaintiff was receiving earnings by his own labour or other gainful activity before he was injured as statutorily required pursuant to s. 28A(2)(c)(i) and (ii) of the Civil Law Act 1956 ('CLA'). Therefore, an adverse inference ought to be drawn against him pursuant to s. 114(g) of the Evidence Act 1950. Accordingly, the award on loss of future earnings was set aside altogether. As for the loss in earning capacity, based upon the medical reports, there was no mention that the plaintiff could not work if the recommended follow-up treatment was undertaken. As there was no evidence of a real and substantial loss as required by s. 28A(2)(c)(i) and (ii) of the CLA, the claim for loss of earning capacity must similarly fail. (paras 82, 84, 87-89 & 91)

(6) Having found that the plaintiff was not receiving earnings by his own labour or other gainful activity before he was injured at the time of the accident, there should not have been any award at all for loss of actual income and a claim for the same was an abuse of the process of the court. However, as there was no appeal by the defendant against the award for loss of actual income, this court would not disturb this part of the award. (para 92)

(7) Therefore, in a running down action, the plaintiff who, at the time of the accident, had no driving licence, no road tax and in particular, no policy of insurance against third party risks ought not to be entitled to relief, in whole or in part as may be determined by the court. (para 97)

Case(s) referred to:

Abdul Azim Abdul Halim v. Vinod Kannan Sivajothi & Anor [2017] 1 LNS 1404 HC ***(refd)***

Abdul Wahab Jam Jam v. Abdul Wahab Abdullah & Anor [2008] 7 CLJ 741 HC ***(refd)***

Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 9 CLJ 153 FC ***(refd)***

Badham v. Lambs [1945] 2 All ER 294 ***(refd)***

Berjaya Sompo Insurance Bhd v. Zuraida Hashim & Ors [2020] 1 LNS 1583 HC ***(refd)***

Che Wil Che Ali v. Mahmood Ismail [1982] CLJ 484; [1982] CLJ (Rep) 420 HC ***(refd)***

Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(refd)***

Chua Kim Suan & Teoh Teik Nam v. Government Of Malaysia & Anor [1994] 1 CLJ 321 SC ***(refd)***

Edwards v. Weeks [1930] VLR 225 ***(refd)***

Godfrey v. Cooper [1920] OJ No 93 ***(refd)***

Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor [2020] 4 CLJ 479 CA ***(refd)***

James Morgan v. Bryson Recycling Limited [2018] NIQB 12 ***(refd)***

John Ambrose v. Peter Anthony & Anor [2017] 6 CLJ 465 CA ***(refd)***

Krishnan Perumal & Anor v. Yang Cheng Choy & Anor [2010] 1 LNS 436 CA ***(refd)***

Kumpulan Prasarana Rakyat Johor Sdn Bhd v. Emercon Bina Sdn Bhd [2020] 1 LNS 1299 CA ***(refd)***

Lee Chee Kuan lwn. Yogeswaran Sinniah & Satu Lagi [2019] 1 LNS 2310 HC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(foll)***

Lim Chor Ching & Ors v. Idris Abdul Karim & Another Appeal [1998] 3 CLJ Supp 145 HC ***(refd)***

Maimunah Hassan (Sebagai Wakil Harta Pusaka Rozita Khamis) & Satu Lagi lwn. Marimuthu Samanathan & Satu Lagi [1993] 1 CLJ 119 HC ***(refd)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2017] 9 CLJ 401 FC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(dist)***

Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd [2020] 2 CLJ 609 CA ***(refd)***

Mohd Hafizul Mokhtar & Anor lwn. Mohd Zaki Kamarudin [2007] 1 LNS 561 HC ***(refd)***
Muhammad Noor Redzuan Misran v. Muhammad Amirul Hafiz Khairrulazuin [2020] 5 CLJ 807 HC ***(refd)***
New India Assurance Co Ltd v. Pang Piang Chong & Anor [1971] 1 LNS 90 HC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 FC ***(refd)***
Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Pang Mun Chung & Anor v. Cheong Huey Charn [2018] 8 CLJ 663 CA ***(refd)***
Patel v. Mirza [2017] 1 All ER 191 ***(foll)***
PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(not foll)***
Quah Ooi Keat & Anor v. Yew Phaik Hoon [1966] 1 LNS 151 FC ***(refd)***
Rehmani Begum And Ors v. Krishnan Pal and Ors (MAC APP 957/2017) & CCM Appl 39162/2017) ***(refd)***
S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 6 MLRA 350 ***(refd)***
Siti Athirah Mohd Sapuan v. Razanatul Ain Hassan & Anor [2015] 6 CLJ 295 CA ***(refd)***
Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor [2001] 1 CLJ 498 HC ***(refd)***
Sukatno v. Lee Seng Kee & Anor [2009] 4 CLJ 171 CA ***(refd)***
Sumarni v. Yow Bing Kwong & Anor [2008] 3 CLJ 489 CA ***(refd)***
Tam Chye Choo & Ors v. Chong Kew Moi [1970] 1 All ER 266 ***(refd)***
Tay Lye Seng & Anor v. Nazori Teh & Anor [1998] 3 CLJ 466 CA ***(refd)***
Tineskumar Ravindran lwn. Nor Shahizan Ibrahim [2018] 1 LNS 1476 HC ***(refd)***
United Plywood And Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***
Walker v. British Columbia Electric Railways Co [1926] BCJ No 99 ***(refd)***
Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA ***(refd)***
Yoon Fong Yin, Sebagai Wakil Diri Harta Pesaka Yong Gun Ham (Si Mati) v. Fazree Syed Majid [2020] 1 PIR [53] ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)(i), (ii)
Evidence Act 1950, ss. 103, 114(g)
Road Transport Act 1987, ss. 15, 23, 26(1), 90

Motor Vehicles Act 1988 [Ind], ss. 2(10), 3(1)
Road Traffic Act 1961 [Northern Ireland], s. 18(1)

For the appellant/defendant - K Selvanayagam & Nuramni Fatira Mohd Nizam; M/s Kenneth William & Assocs
For the respondent/plaintiff - T Manoharan, Nik Muhammad Syafiq Nik Hilmi & Muhammad Wafi Abdullah; M/s Ong & Partners

Reported by S Barathi

A

JUDGMENT

Su Tiang Joo JC:

Query: In a running down action, should the plaintiff who at the time of the accident had no driving licence, no motor vehicle licence (or commonly known as road tax) and no policy of insurance against third party risks be entitled to any relief from the court?

B

Introduction

[1] This is an appeal by the appellant who was the defendant in the court below and a cross-appeal by the respondent who was the plaintiff against the whole of the decision of the Sessions Court Judge ("SCJ") given on 27 December 2019 in a running down claim. In this judgment the parties shall be referred to as they were in court below.

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[2] Liability was apportioned with 70% cast upon the defendant and 30% onto the plaintiff.

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[3] Each party contends that the other party ought to be found wholly liable for the accident.

[4] As a result of the accident, the plaintiff suffered serious personal injuries.

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[5] The Sessions Court's award of future loss of earnings and loss of earning capacity in favour of the plaintiff was assailed by the defendant as being baseless and speculative whereas the plaintiff attacked it on the ground that there was too much deduction for living expenses.

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[6] After hearing parties, on 6 May 2021 this court pronounced its brief decision which is subject to amplification, that:

(i) on the issue of liability, the court agrees with the learned trial SCJ that the accident was in the main caused by the defendant and the SCJ's apportion of liability at 70:30 premised upon the evidence is fair;

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(ii) however, by reason of the plaintiff not having any motor insurance policy on foot, no motor and driving licence at the time of the accident and with him having been riding without a licence for many years, the court denies the plaintiff his full entitlement to 70% liability on the part of the defendant and will discount the same by a further 30%;

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(iii) accordingly, the defendant's appeal is allowed, with the decision of the SCJ varied with liability to be apportioned as between defendant and plaintiff at 40:60;

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(iv) the court concludes that in a running down action, the plaintiff who at the time of the accident had no riding licence, no road tax and more importantly, no policy of insurance against third party risks ought not to be entitled to relief, in whole or in part as may be determined by the court based upon the considerations that obtain in the *Patel v. Mirza* test laid down by the UK Supreme Court and reported in [2017] 1 All ER 191 and which has been adopted by our courts in Malaysia in a variety of cases;

(v) on the issue of quantum of damages, the defendant's appeal against loss of future earnings is allowed and the decision by the Sessions Court on this award is set aside;

(vi) the plaintiff's cross-appeal on the issue of both liability and quantum is dismissed.

(vii) with the defendant having succeeded substantially in his appeal as well as against the plaintiff's cross-appeal, the decision of costs by the SCJ is set aside with costs of this appeal by the defendant and the cross-appeal by the plaintiff to be borne by the plaintiff. For the avoidance of any doubt, there is no order for costs in the Sessions Court; and

(viii) after hearing parties with the defendant/appellant seeking costs of RM10,000 for this appeal and the plaintiff/respondent offering RM3,000, this court awarded costs of RM10,000 subject to allocatur, to the defendant.

[7] Dissatisfied, by notice of appeal dated 17 May 2021, the plaintiff appeals to the Court of Appeal and the following are the full grounds of judgment for the decision made.

Background Facts

Diametrically Opposing Stories

[8] The plaintiff pleaded that on 5 July 2018 at about 2am, he was riding his motorcycle registration number AFM 2979 from the Tapah Road on the way to Langkap and upon reaching the 30km mark of Jalan Langkap - Kampar, he stopped at a T-junction and after ensuring there were no vehicles from the direction of Kampar, he came out of the junction. (encl. 5, pp. 4 and 5).

[9] The plaintiff further pleaded that, however, after he came out and while he was on the main road to Langkap, the defendant driving motor car with registration number ADA 5558 and travelling in the direction of Kampar suddenly at great speed made a U-turn in the opposite direction, entered the plaintiff's right of way and collided with the front right part of the plaintiff's motorcycle causing the plaintiff to fall and suffer (serious) injuries. (encl 5, pp. 4 and 5 para. 3)

[10] The plaintiff claimed that the accident was caused wholly and/or substantially by the negligence of the defendant (encl. 5, pp. 4 and 5, para. 5).

[11] The defendant, on the other hand, had a very different version of how the accident occurred.

[12] According to the defendant, the accident was caused wholly by the plaintiff and or contributed by the negligence of the plaintiff himself (encl. 5, p. 13, para. 5).

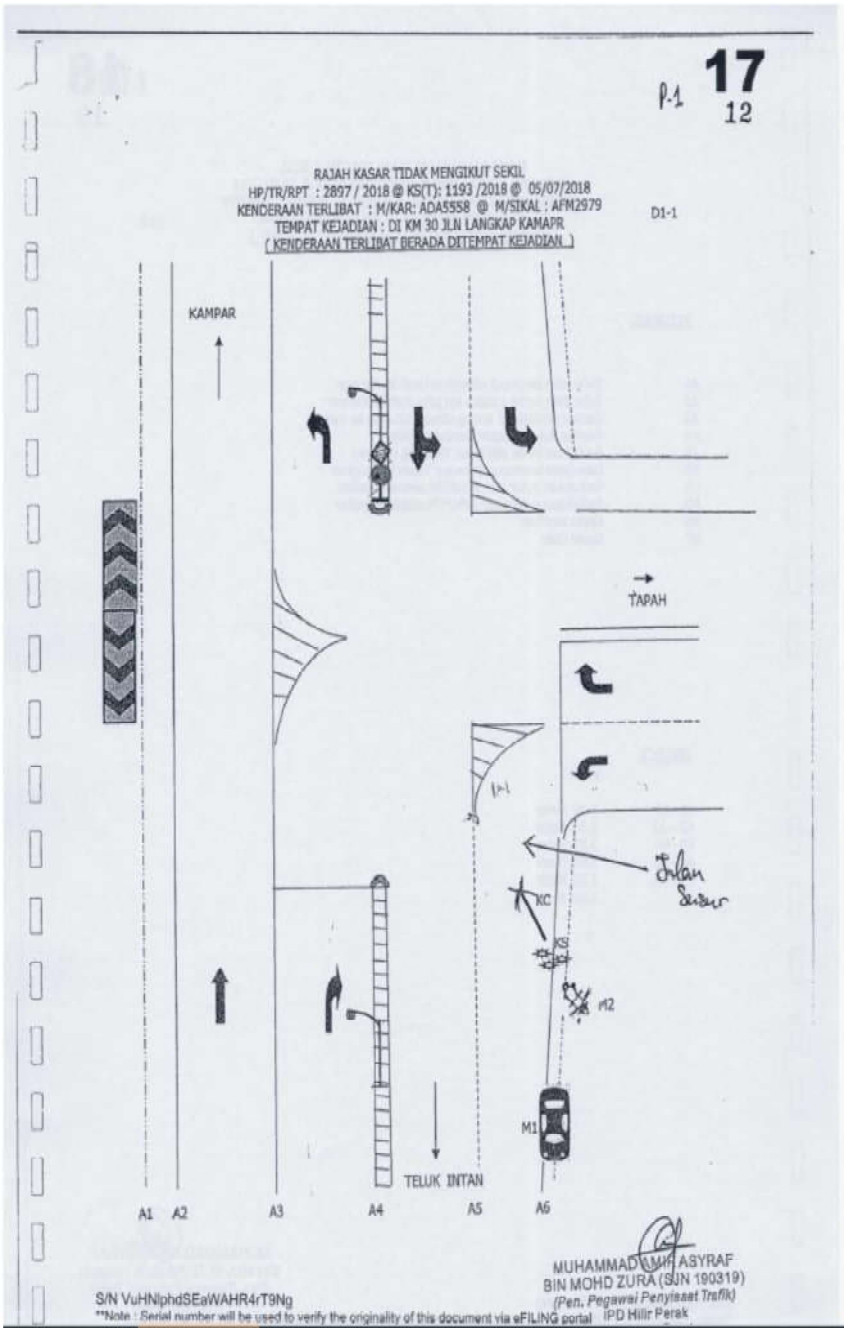
[13] In summary, the defendant denied that he made any U-turn. Instead, he was driving straight heading home towards Langkap/Teluk Intan from Kampar when the plaintiff suddenly came out of the junction, without first stopping to ascertain that it was safe to do, and rode into his (the defendant's) right of way causing the defendant to collide with the plaintiff without any opportunity to prevent the accident.

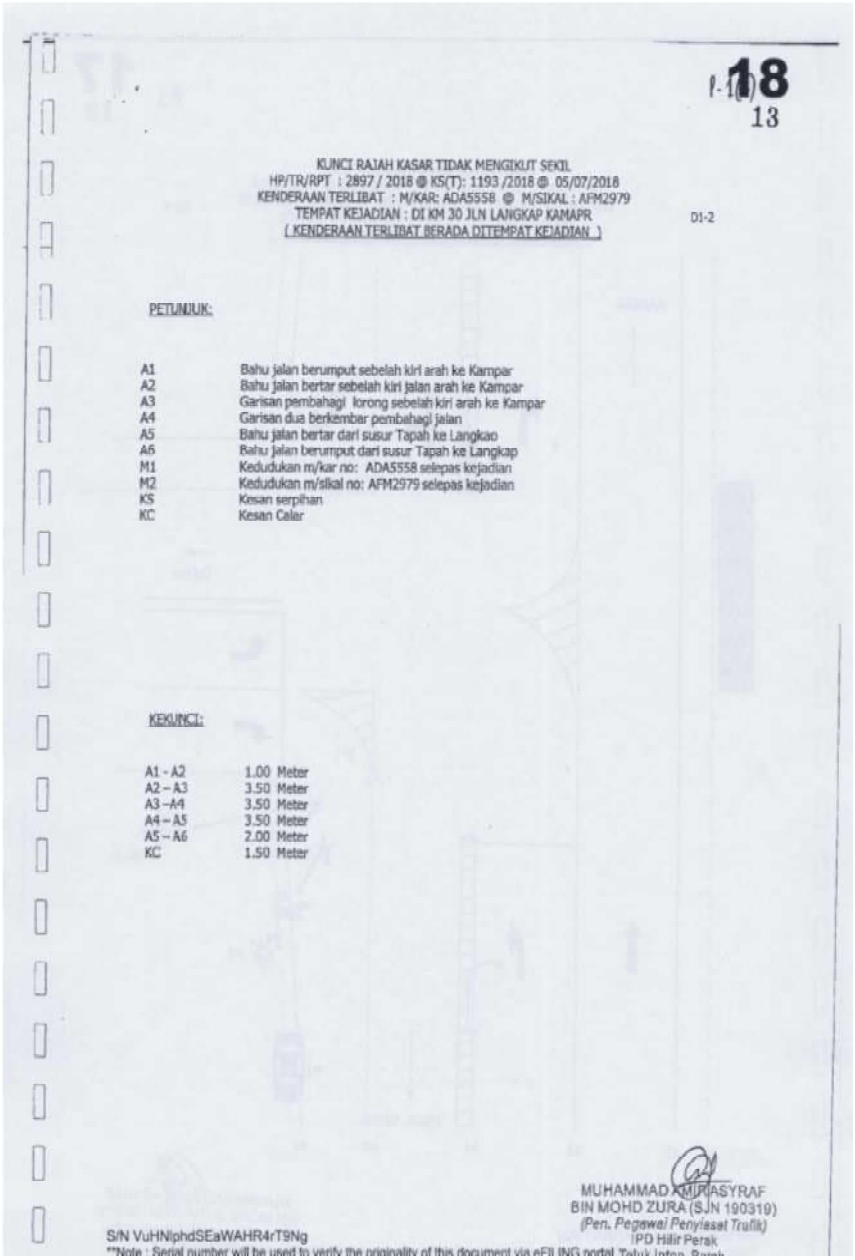
No Eye-Witness To The Accident

[14] Save for the plaintiff and the defendant, there were no other eyewitnesses to the early morning 2am accident.

Sketch Plan And Key

[15] The sketch plan of the scene of the accident and its key (encl. 6 pp. 17 and 18, exhs. P1 and P1(k)) is reproduced here to better assist in understanding the grounds of this judgment:


P.1 17
12
RAJAH KASAR TIDAK MENGIKUT SKIL
HP/TR/RPT : 2897 / 2018 @ KS(T): 1193 /2018 @ 05/07/2018
KENDERAAN TERLIBAT : M/KAR: ADA5558 @ M/SIKAL : AFM2979
TEMPAT KEJADIAN : DI KM 30 JLN LANGKAP KAMAPR
(KENDERAAN TERLIBAT BERADA DITEMPAT KEJADIAN)
D1-1
KAMPAR
TAPAH
Jalan Sedang
KC
M2
M1
TELUK INTAN
A1
A2
A3
A4
A5
A6
MUHAMMAD LUQMAN ASYRAF
BIN MOHD ZURA (SUN 190319)
(Pen. Pegawai Penyiasat Trafik)
IPD Hilir Perak
S/N VuHNlphdSEaWAHR4rT9Ng
**Note : Serial number will be used to verify the originality of this document via eFILING portal



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KUNCI RAJAH KASAR TIDAK MENGIKUT SKEL
HP/TR/RPT : 2897 / 2018 @ KS(T): 1193 /2018 @ 05/07/2018
KENDERAAN TERLIBAT : M/KAR: ADA5558 @ M/SIKAL : AFM2979
TEMPAT KEJADIAN : DI KM 30 JLN LANGKAP KAMAPR
(KENDERAAN TERLIBAT BERADA DITEMPAT KEJADIAN)

D1-2

PETUNJUK:

A1	Bahu jalan berumput sebelah kiri arah ke Kampar
A2	Bahu jalan bertar sebelah kiri jalan arah ke Kampar
A3	Garisan pembahagi lorong sebelah kiri arah ke Kampar
A4	Garisan dua berkembar pembahagi jalan
A5	Bahu jalan bertar dari susur Tapah ke Langkao
A6	Bahu jalan berumput dari susur Tapah ke Langkap
M1	Kedudukan m/kar no: ADA5558 selepas kejadian
M2	Kedudukan m/sikal no: AFM2979 selepas kejadian
KS	Kesan serpihan
KC	Kesan Calar

KEKUNCI:

A1 - A2	1.00 Meter
A2 – A3	3.50 Meter
A3 –A4	3.50 Meter
A4 – A5	3.50 Meter
A5 – A6	2.00 Meter
KC	1.50 Meter

MUHAMMAD AMIR ASYRAF
BIN MOHD ZURA (SJN 190319)
(Pen. Pegawai Penyiasat Trafik)
IPD Hilir Perak

S/N VuHNlphdSEaWAHR4rT9Ng
**Note : Serial number will be used to verify the originality of this document via eFILING portal Tolak Intra Rasah

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Investigating Officer's Testimony

[16] The investigating officer, Sergeant Muhammad Amir Asyraf bin Mohd Zura (PW1) testified *vide* his witness statement that from his investigation and from the debris from the accident and marks on the road he concluded that the accident occurred on the right of way of the plaintiff because that is the right of way of vehicles coming out from the junction from Tapah. Any vehicles coming from Kampar should not make a U-turn to enter the right of way of vehicles coming out of the junction from Tapah.

[17] However, he had classified the case as "Refer to Magistrate" because the defendant's version was that he was travelling straight from Kampar (encl. 5, pp. 19 and 20, Q&A 14 and 15).

[18] In other words, based upon the available evidence, he (PW1) was unable to conclude whose version was the truth. (See his testimony under cross-examination in encl. 10, pp. 30 to 32 where he testified as follows:

S: Di sini, kita ada dua versi: bukan versi berlainan, tapi versi bercanggah mengikuti arah perjalanan?

J: Ya.

S: Yang pertama, kita melihat penunggang motosikal: beliau kata beliau keluar daripada simpang sebelah kanan hendak ke bawah di sebelah Teluk Intan. Kemudian kereta, dari arah bawah telah membuat satu U-turn dan melanggar beliau. Itu adalah versi Plaintif iaitu motosikal?

J: Betul

S: Versi pemandu kereta, beliau dari atas hendak pergi terus ke bawah. Dan motosikal keluar daripada simpang dan beliau berlanggar. Betul ya?

J: Betul, Tuan.

…

J: Kedua-dua laporan bercanggah, dari segi versi arah perjalanan, dan saya tak dapat putuskan mana arah yang betul sebab tiada saksi bebas.

S: Betul. Tak boleh tentukan siapa bersalah, kereta atau motor. Cuma kata kita tak dapat menentukan bagaimana kemalangan berlaku, dan kita RTM. Betul Sarjan?

J: Betul.

Trial Court's Findings

Liability Issue

[19] In view of the conflicting evidence given by both parties, the learned SCJ took the approach of believing the evidence which is more probable based upon the evidence of all the witnesses including the silent evidence such as the sketch plan and photographs produced (encl. 10, pp. 6 and 7).

[20] In summary, the learned trial judge accepted the version of the plaintiff that the defendant had made a U-turn and was 70% to blame for the ensuing accident. This is the finding that the defendant is appealing against.

[21] After finding the defendant negligent, the learned trial judge also found that the accident would not have occurred but for the contributory negligence of the plaintiff for riding his motorcycle too fast (encl. 10, p. 7, para. 3). On this, the trial judge found that the extent of the plaintiff's contributory negligence was 30%. This is the finding that the plaintiff in this appeal seeks to reverse.

[22] The SCJ had correctly directed himself that liability ought to be imposed based upon whoever's version is accepted to be more inherently probable (encl. 10, pp. 7 and 8) and he had referred to the authorities of *Noorianti Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC and that of *Krishnan Perumal & Anor v. Yang Cheng Choy & Anor* [2010] 1 LNS 436; [2010] MLJU 493 CA which held that:

> The litigants gave conflicting versions as to who encroached onto whose path. It is trite law that where there are two conflicting versions as to how an accident occurred, the best approach is to refer to independent evidence such as the sketch-plan, photographs and the nature of damages to the respective vehicles. On this logical guidance suffice to refer to the cases of: *San Seong Choy & Ors. v. Yuson Bien* [1962] 1 LNS 181; [1962] MLJ 427; *Lim Ewe Teik v. Ariffin bin Hussain* [1990] 2 CLJ 191; [1990] 2 CLJ (Rep) 440 and *Lim Swee Cheng & Anor v. Md. Kasiman bin Kasim & Anor* [1995] 2 CLJ 440.

[23] See also *Lim Chor Ching & Ors v. Idris Abdul Karim & Another Appeal* [1998] 3 CLJ Supp 145 HC and *Sukatno v. Lee Seng Kee & Anor* [2009] 4 CLJ 171 CA which held that the trial judge has to look at the inherent probabilities of the case as to which version is inherently more probable than the other.

[24] The trial judge held that based upon the silent evidence and the sketch map he believed the plaintiff's version (encl. 10, p. 9, para. 3) because:

(i) the debris of the accident and scratch marks on the road show that the accident occurred at the lane "A5-A6" on the sketch plan (see above) and by reason of this, it tends more to support the plaintiff's version that the accident occurred when the plaintiff came out from the junction heading left and was hit by the defendant who was making a U-turn at the said junction (encl. 10, p. 7, para. 2 and p. 9, para. 3); and

(ii) the damage to the front and right of the (plaintiff's) motorcycle was rather severe whereas the damage to the (defendant's) motorcar was concentrated at the front left and the SCJ concluded that these supports the plaintiff's version.

[25] In other words, the trial judge had arrived at findings which are really inferences from primary facts namely that:

(i) the debris from the accident was at the lane marked "A5-A6";

(ii) there were scratch marks on the road which would place the location of the accident;

(iii) the damage to the front and right of the plaintiff's motorcycle was severe; and

(iv) there was damage to the front left of the defendant's motorcar.

[26] The trial judge made a critical finding that he believed that the collision occurred at lane A5-A6 **whilst the defendant was making a U-turn at the junction. The corollary is that he disbelieved that the defendant was travelling straight from Kampar to Teluk Intan.** The reason being that the trial judge took the view that the silent evidence in the sketch plan supports the plaintiff's version more. (encl. 10, p. 7 para 2). (emphasis added)

This Court's Analysis And Findings

Liability Issue

[27] Matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction are often not interfered with by the appellate courts. (See *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; [2010] 1 MLRA 117; [2010] 3 MLJ 425 CA, *Master Jaya Environmental Sdn Bhd v. Pentas Flora Sdn Bhd* [2020] 2 CLJ 609; [2020] 4 MLRA 137; [2020] 2 MLJ 117 CA).

[28] However, it has been settled by the Federal Court more than 44 years ago in *Quah Ooi Keat & Anor v. Yew Phaik Hoon* [1966] 1 LNS 151 that:

> Secondly, I think that the distinction between **specific findings of fact and findings which are inferences from specific facts found must be borne in mind.** Where the trial Judge arrived at findings which are really inferences from primary facts, it is important to know what those primary facts were, since the validity of such inferences needs to be tested by the grounds which form their basis. If this is done the appellate Court can readily see either that the inferences are irresistible or that there are flaws of reasoning which had escaped attention. **This is especially necessary where there is a conflict of evidence** and the evidence of one set of witnesses is preferred to that of the other. Where, on the other hand, grounds for the inferences are not forthcoming, one may be forgiven for thinking that

A they are founded on nothing more substantial than superficial general impressions which, of course, are easily liable to error. In this connection I would refer to the observations of their Lordships in *Benmax v. Austin Motor Co. Ltd* [1955] 1 All ER 326. (emphasis added)

[29] This court takes judicial notice that Langkap is in the direction of B Teluk Intan and if one is travelling from the direction of Tapah, in order to get to Langkap one would have to turn left at the junction from Tapah (see the sketch plan above).

[30] Applying the same test that the trial judge had directed himself, ie, that in *Noorianti Zainol Abidin & Ors* (*supra*) and *Krishnan Perumal & Anor* (*supra*) C this court guided by the submissions filed by both parties and after going through the notes of evidence in detail makes the following analysis.

[31] With the damage being at the front left of the defendant's car; to the front right of the plaintiff's motorcycle; to the right exhaust pipe of the motorcycle; with no damage to the rear of the motorcycle and the injuries D suffered was the plaintiff's right leg and none on his left leg:

(i) if the defendant, as he said, was coming down from Kampar and heading towards Teluk Intan, he would be colliding with the plaintiff's motorcycle from behind and not the front if the plaintiff was turning E left to Teluk Intan. If the defendant's version is accepted it is more probable that the plaintiff was turning right but the plaintiff maintained he was turning left to go to Langkap to a 7-11 shop;

(ii) with the scratch marks and the debris in the slip road (jalan susur) located at "A5-A6" in the inner lane of the "ghost island" (in the shape F of a triangle with lines drawn across it) it is inherently improbable that the plaintiff was turning right and had in fact turned left towards Langkap/Teluk Intan;

(iii) the corollary is that it is more probable that the collision occurred with the defendant coming from Teluk Intan and making a U-turn to go back G in the direction of Teluk Intan at the time of the collision;

(iv) however, the collision occurred at a junction which was not dark but had average (sederhana) lighting;

(v) the plaintiff admitted that he saw the defendant's car and he came out H of the junction at a speed of about 40 km/hr thinking that the defendant would be going straight but instead, the defendant did a U-turn and caused the collision;

(vi) logically, if the plaintiff had stopped at the junction as he said he did, with him having seen D's car at the junction, it is inherently I improbable that he would be travelling at 40km/hr;

(vii) the corollary is that it is inherently improbable that the plaintiff stopped at the junction but instead was travelling at a speed of 40km/hr when he came out of the junction making it not possible to avoid colliding with the defendant's car who was making a U-turn at the junction;

(viii) this would be in line with the testimony of the plaintiff that the impact of the collision caused him to be flung to the spot marked as "KS" before being moved to "MS" along "A5-A6", with the debris from the accident strewn at the place marked as "KS" along "A5-A6", scratch marks on the road at the place marked as "KC" along "A5-A6" and the damages to both the vehicles being consistent with this version; and

(ix) which would lead to the conclusion that the plaintiff had contributed to the negligence of the defendant who had made a U-turn at the junction without ascertaining that it was safe to do so.

[32] Appellate interference is warranted where the trial judge has made a decision which is plainly wrong. A decision is plainly wrong if it is one which no reasonable judge could have reached. See *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 where it was held that:

> The law is clear in that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle. The principle encompasses differing and multiple circumstances, but must necessarily apply, *inter alia*, to situations where it can be shown that the impugned decision is vitiated with plain material errors, or where crucial evidence had been misconstrued, or where the trial judge had so manifestly not taken proper advantage of having seen and heard the witnesses or not properly analysed the entirety of the evidence before him, or where a decision was arrived at without adequate judicial appreciation of the evidence such as to make it rationally unsupportable. This said, the criterion that is central to appellate intervention must remain that deference to the trier of fact is still the rule and not the exception; and the plainly wrong test ought not to be used by the appellate court as a means to substitute the impugned decision with its own.

[33] The Federal Court in *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors* [2019] 6 MLRA 350 laid down several instances when decisions are considered to be plainly wrong or perverse. Some of the instances where the trial judge's decision is perverse, are where the trial judge had:

(i) misdirected himself on the evidence;

(ii) failed to judicially appreciate the evidence;

(iii) failed to consider any material evidence;

(iv) acted on some irrelevant evidence as to render the decision wholly erroneous;

(v) made wrong inference from facts;

(vi) misapprehended the facts; and

(vii) gave reasons which are wholly unsatisfactory or contradictory of each other.

(See also *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 1 MLRA 95; [2003] 2 MLJ 97; [2003] 2 AMR 357 CA).

[34] Premised upon the above analysis, whilst this court may have been minded to apportion a higher percentage of contributory negligence onto the plaintiff for having admittedly come out of the junction at such high speed, the percentage of liability of 30% which the trial judge had set is within the legitimate exercise of his discretion and this court sitting as an appellate court would not interfere with the same.

[35] However, there is another piece of evidence which the trial judge had not considered at all and that is that at the time of the accident, plaintiff had no licence to ride a motorcycle, the motorcycle he was riding had no road tax and no insurance. In other words, plaintiff should not have been on the road at all at the material time.

No Licence, No Road Tax And No Insurance

[36] During course of cross-examination of the plaintiff (PW2), the following evidence came to light (encl. 10, pp. 50 to 53):

S: … Masa kemalangan, tahun lepas ya. Ada lesen motosikal?

J: Tiada.

…

S: Tiada? Jadi tahun lepas semasa kemalangan berlaku, kamu berumur 27 tahun ya?

J: Ya, 27 tahun.

S: Dan pada tahap umur 27 tahun kamu tiada lesen motosikal, betul?

J: Betul.

S: Motosikal itu ada insurans dan road tax ke? Cakap benar ya, dah ambil sumpah. Ada road tax, ada insurans?

J: Tiada.

…

S: … Jadi soalan saya, setuju dengan saya bahawa sebuah kenderaan yang tidak ada road tax dan insurans tidak sepatutnya berada di atas jalanraya. Adalah satu kesalahan di bawah JPJ. Setuju dengan saya?

...

Hakim: Setuju tak?

S: Setuju.

…

S: Berapa tahun En Ahmad menunggang motosikal? Sejak umur berapa?

J: Dah lama, sudah lama lah bawa.

S: Lama? Lebih kurang 10 tahun? Umur 20 tahun? Umur 17 tahun?

J: 19, 17 macam tu lah.

S: 19 tahun ya? Ok. Jadi pernah ke En Ahmad pergi ke pejabat JPJ? Ataupun ke sekolah memandu untuk cuba dapatkan lesen motosikal? Mula-mula, pernah pergi ke sekolah ujian menunggang motosikal untuk belajar menunggang motosikal? Pernah pergi ke?

J: Tak.

S: Tak pernah? Dan pernah ke En Ahmad pergi untuk menduduki peperiksaan lisan di JPJ tentang peraturan jalanraya?

J: Tak pernah

S: Dan pernahkah En. Ahmad cuba mendapat lesen menunggang motorsikal dekat JPJ? Pergi memohon untuk dapat lesen?

J: Pernah

S: Pernah? Tapi tidak berjaya?

J: Ya.

[37] The plaintiff then continued with his testimony (encl. 1, p. 52) that he was not successful in getting his motorcycle license because he had insufficient money. However, when pressed that with him saying he has started working and would have money, he admitted that despite that, he has yet to go and get a licence. The evidence led from the plaintiff was that he had been riding a motorcycle for at least eight years since he was 19 years of age without a licence until the time of the accident. And, he knew that riding one without a licence, road tax and insurance cover is against the law and in any event, ignorance of the law is no defence. This court therefore, is driven to infer that the plaintiff was wilfully indifferent to the dictates of the legal requirements for riding a motorcycle on the road.

[38] With such evidence led during the trial without any objections by the plaintiff, this court was then confronted with the query set out in the opening to the grounds of judgment herein, which is reproduced below:

> In a running down action, should the Plaintiff who at the time of the accident had no riding licence, no road tax and no motor insurance policy be entitled to any relief from the Court?

[39] This court undertook an analysis of the following cases in Malaysia:

(i) in *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 8 CLJ 663; [2018] 4 MLJ 594, which is a contract case, the Court of Appeal held at para. [25] that:

> *As long as all the relevant facts are before the court and no new evidence is required, the court is in fact duty bound to take cognizance of any illegality, even on its own motion, and even if it has not been pleaded (see Merong Mahawangsa & Anor v. Dato Shazryl Eskay bin Abdullah [2015] 5 MLJ 619) FC (a contract case).* (emphasis added)

(ii) see also *John Ambrose v. Peter Anthony & Anor* [2017] 6 CLJ 465; [2017] 4 MLJ 374 CA, a contract case, where Tengku Maimun Tuan Mat JCA (now Chief Justice) said at para. [41]:

> *In our view, the most pertinent principle encapsulated in Merong Mahawangsa is that the courts are bound at all stages to take notice of illegality whether ex facie or which later appears, even though not pleaded,* and that it was contrary to public policy that a person should be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government.

(iii) in *Maimunah Hassan (Sebagai Wakil Harta Pusaka Rozita Khamis) & Satu Lagi lwn. Marimuthu Samanathan & Satu Lagi* [1993] 1 CLJ 119 HC, Dato' Hj Mohd Noor bin Hj Ahmad J relying upon the authorities of *Tam Chye Choo & Ors v. Chong Kew Moi* [1970] 1 All ER 266; *Badham v. Lambs* [1945] 2 All ER 294, *New India Assurance Co Ltd v. Pang Piang Chong & Anor* [1971] 1 LNS 90; [1971] 2 MLJ 34 HC and *Che Wil Che Ali v. Mahmood Ismail* [1982] CLJ 484; [1982] CLJ (Rep) 420; [1982] 2 MLJ 354 HC, held that a motorcyclist is not negligent merely because he has no valid riding licence, road tax and insurance;

(iv) in *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448 HC Abdul Malik Ishak J held that the respondent did not have a driving licence and was not wearing a crash helmet plus the fact that the motorcycle was ridden without road tax and insurance and was not fitted with a horn could not in law make him negligent;

(v) in *Tineskumar Ravindran lwn. Nor Shahizan Ibrahim* [2018] 1 LNS 1476 HC, Abu Bakar Katar JC following *Chu Kim Sing* (*supra*) held that the plaintiff at the time of the accident did not have a valid driving licence cannot mean that he was negligent.

(vi) in *Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor* [2001] 1 CLJ 498 HC, Jeffrey Tan J held that riding or driving without a valid licence *per se* is not negligent, "that person is not fair game with no rights";

(vii) in *Mohd Hafizul Mokhtar & Anor lwn. Mohd Zaki Kamarudin* [2007] 1 LNS 561 HC, in an appeal from the Sessions Court, the plaintiff did not have a driving licence for the motorcycle that he was riding and he led no evidence that he knew the Highway Code or that he had the experience and skill to ride a motorcycle. Mohtarudin Baki J (now JCA) held that whilst this *per se* is not negligence, the court should not be sympathetic to the injuries suffered and need to act without fear or favour with the hope that the attitude of blatant disregard for the rule of law will be curtailed. After saying, "imagine what if the plaintiff was summoned and he had no insurance (with no licence) to pay damages". His Lordship went on to dismiss the entire plaintiff's claim on the premise that he had failed to prove his case on a balance of probabilities as is required under s. 103 of the Evidence Act 1950 and ordered that any payment made to the plaintiff is to be repaid with interest. It is to be noted that the trial judge in the Sessions Court had held that the plaintiff was guilty of contributory negligence by only 10%;

(viii) in *Muhammad Noor Redzuan Misran v. Muhammad Amirul Hafiz Khairulazuin* [2020] 5 CLJ 807 HC, Awang Armadajaya Awang Mahmud JC – based upon the maxim *ex turpi causa non oritur actio* (from a dishonourable cause an action does not arise), a person who is a danger both to himself or anyone else for lack of a valid driving licence to drive or ride on a road should not be on the road. It is public policy as reflected by the intention of Parliament in ss. 26 and 90 of the Road Transport Act 1987 ("RTA 1987"). In the case where a driver was not covered by the insurance policy by virtue of the fact that he had no driving licence and hence, should not be on the road, that conduct of driving a motor vehicle without a valid licence was itself an illegal act. The law cannot protect one who has no regard for the law. If the appellant was not on the road because he was unlicensed or without road tax, there would not be any vehicle for the respondent to knock into. His Lordship said:

> To allow the appeal would tantamount to rewarding the appellant for not complying with the law, or worse, to reward him for the violation of the very law that seeks to regulate the conduct of traffic and transportation on the road, by posing a danger both to himself and above all, to other law abiding users of the road. In the exercise of the court's inherent jurisdiction of this court pursuant to O. 1A and O. 92 r. 4 of the ROC 2012, liability held to be on the appellant 100%";

(ix) in *Lee Chee Kuan lwn. Yogeswaran Sinniah & Satu Lagi* [2019] 1 LNS 2310 HC, Awang Armadajaya Awang Mahmud JC similarly held likewise;

(x) in *Berjaya Sompo Insurance Bhd v. Zuraida Hashim & Ors* [2020] 1 LNS 1583; [2020] MLJU 1820, Liza Chan Sow Keng JC (a contract case) – on a declaration that an insurance policy is unenforceable because the policy holder did not have a valid licence, the learned JC cited with approval the above case of *Muhammad Noor Redzuan Misran* (*supra*) and reliance was also placed upon the principle that a party ought not to be entitled to take advantage of his own wrong;

(xi) in *Abdul Wahab Jam Jam v. Abdul Wahab Abdullah & Anor* [2008] 7 CLJ 741; [2008] 1 PIR 31 HC, Mohamed Apandi Ali J held that not having a valid driving licence in itself does not mean that the driver is negligent and found the driver to be 80% liable for the accident;

(xii) in *Abdul Azim Abdul Halim v. Vinod Kannan Sivajothi & Anor* [2017] 1 LNS 1404; [2017] 2 PIR 444 HC, Azmi Abdullah JC held that the mere fact a traffic rule is not being adhered to is not the sole consideration in determining an accident and the court needs to seek the cause of the accident in the totality of the prevailing evidence. The case of *Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor* [2001] 1 CLJ 498; [2000] AMEJ 0048 was referred to where the plaintiff motorcyclist was riding without a licence and collided with the defendant. The court found that riding without a licence, even if wrongful, was not the cause of the accident, and therefore there was no contributory negligence and the court enunciated:

> … riding or driving without a valid licence *per se* is not negligent. Perhaps some other violations of the Highway Code, such as failure to give way to through traffic, may enter, depending upon the facts, into the cause of an accident. But riding or driving without a valid licence *per se* would not enter into the cause of an accident. Rather, it is the manner of the riding or driving and or conduct on or in relation to the road that enter into the cause of a motor accident or collision.

(xiii) in *Yoon Fong Yin, Sebagai Wakil Diri Harta Pesaka Yong Gun Ham (Si Mati) v. Fazree Syed Majid* [2020] 1 PIR [53], Hadhariah Syed Ismail J held that the plaintiff possessing no licence and road tax was not a factor in determining the plaintiff's liability and "a traffic offender cannot be equated with a negligent person". There is an editor's note in the law report to the effect that on appeal, the Court of Appeal dismissed the appeal with the decision of the High Court affirmed and at the time of writing my grounds for this judgment, the grounds for the Court of Appeal decision have yet to be supplied;

(xiv) however, I note that the Court of Appeal, in *Tay Lye Seng & Anor v. Nazori Teh & Anor* [1998] 3 CLJ 466 (Siti Norma Yaakob, Abdul Malek Ahmad and Denis Ong JJCA) relying upon the Supreme Court case of *Chua Kim Suan & Teoh Teik Nam v. Government Of Malaysia &*

Anor [1994] 1 CLJ 321; [1994] 1 MLJ 394 held that the maxim of *ex turpi causa non oritur actio* has a limited action in tort and a differently constituted bench of the Court of Appeal held in *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 450 (Low Hop Bing, Heliliah Mohd Yusoff and Abdul Malik Ishak JJCA) that the principle that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act is a principle that is applicable to all causes of action including claims in tort;

(xv) in *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29 FC – Raja Azlan Shah FJ (as His Royal Highness then was) held that although the accident occurred at a time the driver's licence was not renewed, the Federal Court held it was not against public policy for the insurance policy to indemnify the loss arising from the accident because "Road traffic cases eg, manslaughter on the road by gross negligence, negligent driving and the like are not wilful and culpable crimes which makes them contrary to public policy"; and

(xvi) our Supreme Court in the case of *Chua Kim Suan & Teoh Teik Nam v. Government Of Malaysia & Anor* [1994] 1 CLJ 321; [1994] 1 MLJ 394 in a claim in tort, speaking through Peh Swee Chin SCJ after reviewing a number of authorities from Singapore, UK, New Zealand and South Africa held:

> We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present times.
>
> We have realised, of course, that in any case when the claim for dependency is solely based on income earned from an illegal activity, the dependants, though completely innocent of the illegality, will suffer an injustice and the tortfeasor, will obtain an

undeserving windfall. The dependants' interests are thus seen to be irreconcilable with the interests of the law; the latter are, to provide certainty of the law but yet give rise to an injustice in such a situation.

The interests of the law are beyond providing mere certainty of the law. They are also to protect society from illegal activities which, if allowed to pass without judicial castigation would encourage such illegal activities, and allow the perpetrators to set an example to fellow-citizens to regard such illegal activities with tolerance and a desire to follow the same. The insidious consequences are not hard to imagine. With religion losing its grip to significant numbers of society, the interests of law in this sense would have to be rigorously upheld. We therefore are of the opinion that such personal interests of such dependants or other claimants would have to be sacrificed for the greater interests of the law. (emphasis added)

Jurisprudence In Foreign Shores

[40] Both learned counsel for the defendant and the plaintiff brought to the court's attention several authorities in several Commonwealth jurisdictions which practices common law and hence would be persuasive.

[41] In India, s. 2(10) of their Motor Vehicles Act 1988 defines a driving licence means the licence issued by a competent authority authorising the person therein to drive a motor vehicle of any description and s. 3(1) provides that no person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him. In *Rehmani Begum And Ors v. Krishnan Pal and Ors* (MAC. APP. 957/2017) & CCM Appl. 39162/2017) the High Court in Delhi held that a claimant seeking relief has to prove beforehand that he held a valid permit to drive at the time of the accident with reference made to s. 2(10) of the Motor Vehicles Act 1988 of India. The provisions of s. 3(1) of the Indian Motor Vehicles Act 1988 is substantially similar to the provisions of our s. 26(1) of the RTA 1987.

[42] In Northern Ireland, s. 18(1) of their Road Traffic Act 1961 provides that a person shall not use in a public place a mechanically propelled vehicle unless at that time there is in force in respect of the vehicle a test certificate commonly known there as a Ministry of Transportation ("MOT") certificate. In *James Morgan v. Bryson Recycling Limited* [2018] NIQB 12 the plaintiff's motorcar which was parked on public road outside his house when it was collided into by the defendant's worker who did not possess a valid MOT test certificate at the material time and the High Court dismissed the plaintiff's claim as due to the absence of this certificate, the plaintiff's motorcar did not have a valid insurance coverage and was not supposed to be on the public road.

[43] In Victoria, Australia an application to have the plaintiff's action for damages for negligence struck out as he was driving his motorcycle without being licensed was struck out, see *Edwards v. Weeks* [1930] VLR 225.

[44] In Ontario, Canada, the Supreme Court, Appellate Division held that a mere failure to obtain a licence does not deprive the driver of any right of action he would otherwise have against any person who injures him by negligence, see *Godfrey v. Cooper* [1920] OJ No 93. A similar decision was given in Vancouver, British Columbia, see *Walker v. British Columbia Electric Railways Co* [1926] BCJ No 99 where the Court of Appeal held that the absence of a driver's licence should (not) preclude recovery for actionable negligence, and, "the most skilled are often guilty of negligence".

Back To Malaysia

[45] The preponderance of authorities at the High Court level held that riding or driving without a valid licence *per se* is not negligent and the Federal Court in *Malaysia National Insurance Sdn Bhd* (*supr*a) held that an insurance policy will still indemnify the insured even if the insured does not have a valid driving licence at the time of the accident. With respect, this court is of the considered view that the Federal Court had probably decided so in keeping with the public policy of protecting any third party claims consonant with the RTA 1987 as will be seen below.

[46] Unlike the driver in *Malaysia National Insurance Sdn Bhd* (*supra*), the plaintiff in this case never had any insurance policy at all to begin with.

[47] With respect, this court is of the view that the Supreme Court decision in *Chua Kim Suan* (*supra*) on a tort claim can be reconciled with the decision in *Patel v. Mirza* [2017] 1 All ER 191 SC, UK which was applied to claim in contract, see *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2017] 9 CLJ 401; [2017] 5 MLJ 180 FC is yet to be seen. The *ratio* formulated by Lord Toulson SCJ in *Patel v. Mirza* (hereinafter called "the *Patel v. Mirza* test") is as follows:

> **The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system** (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary **(a)** to consider the **underlying purpose** of the prohibition which has been transgressed and **whether that purpose will be enhanced by denial of the claim, (b)** to consider **any other relevant public policy** on **which denial of the claim may have an impact** and **(c)** to consider **whether denial of the claim would be a proportionate response to the illegality,** bearing in mind that punishment is a matter for the criminal courts.
>
> (See also the articles by Justice Datuk Harmindar Singh Dhaliwal (FCJ) on "*The Illegality Defence* after *Patel v. Mirza* [2016] UKSC 42: *A Step Forward?* July [2018] JMJ 29 and by Heng Yee and Kumara Guru Naiker on *Illegality Defence: Judicial Trend in Malaysia* [2018] 1 LNS (A) cxxviii and the recent Court of Appeal authority of In the Court of Appeal of

A Malaysia (Appellate Jurisdiction) Civil Appeal No. S-02(IM)(NCvC)-529-03-2019 *Public Bank Berhad v. Ria Realiti Sdn Bhd & 5 Ors*, a CA judgment dated 19.1.2021 where the *Patel v. Mirza* test was applied in a claim on a bank guarantee). (emphasis added)

[48] Learned counsel for the plaintiff sought to rely upon the Federal Court B authority of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 1 MLRA 505 but with respect, to my mind this authority would assist the defendant rather than the plaintiff because just like the underlying policy of the housing legislation is to aid purchasers, the underlying public policy of the RTA 1987 is for the C need for all motorised road-users to have an insurance policy to aid third party claims.

[49] On lack of insurance policy, as can be seen above, at both the High Court and at the Court of Appeal level, there is a conflict of opinions and given the conflict, this court finds the view expressed by Awang Armadajaya D Awang Mahmud JC relying upon the principle of *ex turpi causa non oritur actio* as refined by the *Patel v. Mirza* test on proportionality, that "In the case where a driver was not covered by the insurance policy by virtue of the fact that he had no driving licence and hence, should not be on the road, that conduct of driving a motor vehicle without a valid licence was itself an illegal E act. The law cannot protect one who has no regard of the law" resonates well and compelling.

[50] Parliament has deemed it fit that all motor vehicles have to be insured at least as against third party claims whilst on the road. Laws have been enacted to provide for this, see s. 90 of the RTA 1987 which is reproduced F below:

> (1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such **a policy of insurance or such a security in respect of third party risks** as G complies with the requirements of this Part.
>
> (2) If a person acts in contravention of this section he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both and a person convicted of an H offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence under Part II for a period of twelve months from the date of the conviction. (emphasis added) I

[51] The rationale is clear. Accidents can and do happen whilst using the road whether through one's own negligence or otherwise. With vehicles generally constructed of hard materials such as steel, being motorised and capable of travelling at great speed, the danger and damage they can cause to other road users are very real. Should any injury or damage be caused or suffered, the wrongdoer may not be able to pay for the same and hence the concept of the need for insurance requiring every road user using a motor vehicle to be first armed with an insurance policy against any third party risks.

[52] I am, therefore, of the view that any claimant who wilfully uses a motor vehicle without insurance should not be entitled to relief should he or she suffer any accident. However, I would not go so far as to deny them relief altogether as there may be circumstances that impel the use of such a motor vehicle out of necessity for eg, in an emergency in having to seek urgent medical aid or help for one reason or another. However, unless there are exceptional circumstances for the use of such a motor vehicle, there should be a reduction in the relief allowed. This is to underscore the message that whilst the claimant may not care for him or herself, there is a price to be paid for ignoring the law passed for the greater good of all users of our roads and in the process posing a great risk to any road user they may negligently cause to suffer damages, personal injury or even die and that these victims including their dependants may not be able to get compensation, in whole or in part, to get on with their lives in a manner which the law deems fit.

[53] It cannot be gainsaid that the concept of insurance is to pool the resources of many to hedge against the costs of a few mishaps. The resources take the form of the premium payable. The premium would be less if there are more insured paying the same. It follows that if every road user were to obey the law and pay for the premium of the motor vehicles he or she uses, the premium would probably go down and this would in turn benefit all road users who are legally obliged to purchase insurance policies.

Application Of The Patel v. Mirza Test

[54] On the strength of the Court of Appeal authority of *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* (*supra*) that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act is a principle that is applicable to all causes of action including claims in tort and with the plaintiff having at the time of the accident having no insurance policy, no road tax and no licence, the court is minded to apply the *Patel v. Mirza* test to this action.

[55] The first consideration of the test is to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim. The prohibitions that the plaintiff had

contravened this case are: (i) using a motor vehicle without having in force a policy of insurance in respect of third party risks in contravention of s. 90 RTA 1987; (ii) driving a motor vehicle without a driving licence authorising him to drive a motor vehicle which in his case is a motor cycle in contravention of s. 26 of the RTA 1987 and (iii) using a motor vehicle in respect of which there is not in force a motor vehicle licence, or what is commonly known as "road tax" in contravention of s. 15 of the RTA 1987.

[56] I am of the opinion that a denial of the claim in whole or in part will serve the underlying purpose of ensuring that only qualified drivers who have undergone a competency test as to qualify for a licence and **who have in force a policy of insurance against any third party risks before** they are permitted to drive. It is not difficult to visualise the damage that can be done by a motorised vehicle in an accident which can cause very serious personal injuries, just like in the instant case or even death to other road users. In the case of personal injuries, the cost of medical care to rehabilitate the victim both physically and mentally can be very large and if the negligent party has no insurance to make good any award a court may order by way of damages, the court's order is only good as a paper judgment. (emphasis added)

[57] Besides being guilty of an offence under s. 23 of the RTA 1987 for using a motor vehicle without a motor vehicle license in force, and upon conviction, the plaintiff can be liable to a fine not exceeding RM2,000, the revenue has been defrauded.

[58] The second consideration of the test is to consider any other relevant public policy on which denial of the claim may have an impact. I am of the opinion a denial of such a claim, in whole or in part, would serve the public policy that there will be no free lunch. It will serve to instil a sense of responsibility to drive all to be armed with a mentality that laws are to be obeyed at all times.

[59] The third consideration of the test is to consider whether denial of the 855 claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. The answer to this consideration in this case can best be answered by postulating, what if the roles were to be reversed ie, that it was the motorcar driver who was without any policy of insurance and is incapable of meeting any monetary award to rehabilitate the motorcyclist who had suffered serious injuries to his right leg; how would the plaintiff/motorcyclist feel? The answer is to my mind obvious, that a denial of the claim in whole or in part would be a proportionate response to the illegality to imbue into all road users with motor vehicles that they must all help and share in carrying the risk of damages that may befall any road user arising from their negligence and in the process assist to reduce the load of insurance premium.

[60] Wherefore, in the circumstances that obtain in this case, although the defendant is more to be blamed for the accident, with the plaintiff having no policy of insurance on foot for his motorcycle at the time of the accident, no motor vehicle licence and with him riding a motorcycle with no driving licence at all for at least eight years, thus, showing his contumacious disregard for the law, guided by the law laid down by our Supreme Court in *Chua Kim Suan* (*supra*), and applying the *Patel v. Mirza* test, this court holds that in the greater interest of the law, the liability of the plaintiff is to be increased by 30%.

[61] In the upshot, liability as between the plaintiff and the defendant is apportioned at 40:60.

[62] A question which caused this court some anxiety was whether with liability of more than 50% having been cast upon the plaintiff should his claim be dismissed because in a civil claim the burden is upon the plaintiff to prove his case on a balance of probabilities. However, the answer is provided by the Court of Appeal in the case of *Siti Athirah Mohd Sapuan v. Razanatul Ain Hassan & Anor* [2015] 6 CLJ 295 where Mohd Hishamudin Yunus JCA speaking for the Court of Appeal held:

> ... we are impelled to add here that the learned Sessions Court Judge should not have 'apportioned' liability between the parties, and should not use expressions as 'liability sebanyak 50% plaintif dan defendan 50%' if what she had meant was that the plaintiff **was only guilty of contributory negligence** and that therefore, the award should accordingly be reduced by 50%. For, the expression used by the learned Sessions Court Judge gives the erroneous impression that both the plaintiff and the first defendant were co-tortfeasors and each equally guilty (50:50) of the tort of negligence; whereas in truth there was only one tortfeasor who was guilty of the tort of negligence ... **Contributory negligence is not the tort of negligence. One must not get confused between the liability for the tort of negligence and liability for contributory negligence.**
>
> See also the case of *Nur Shaheera Abdullah Didakwa Sebagai Wakil Diri Harta Pusaka Kepada Si Mati, Muhammad Nor Shahril Abdullah v. Suhaimi Che Ismail (Mendakwa Sebagai Bapa Yang Sah Dan Tanggungan Kepada Si Mati, Muhamad Azam bin Suhaimi) & Anor* [2020] 1 LNS 1670 as well as the case of *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188 HC where in a running down cum personal injury claim, the plaintiff motorcyclist still succeeded in his claim even though he was held to be the principal actor in the collision and was 75% liable for the accident.
>
> (emphasis added)

[63] It is, therefore, clear that although the defendant may be held to be principally to be blamed for the tort of negligence leading to the accident, the liability to be apportioned to the defendant may exceed 50% by reason of *inter alia* contributory negligence on the part of the defendant.

[64] By analogy, this court had added another 30% of the liability to be borne by the plaintiff in this case for the compelling reason articulated in the Supreme Court decision of *Chua Kim Suan* (*supra*) that the interests of the law are beyond providing mere certainty of the law but also meant to protect society from illegal activities which, if allowed to pass without judicial castigation would encourage such illegal activities, and allow the perpetrators to set an example to fellow citizens to regard such illegal activities with tolerance and a desire to follow the same.

Quantum Issue

[65] This court will now proceed to address the issue of quantum of damages.

[66] It is this court's view that the *ex turpi causa* principle as refined by the *Patel v. Mirza* test is to apply and, any damages, subject to proof, that is to be awarded to such a claimant ought to be premised upon the lowest scale in the Compendium of Personal Injuries so as to judicially castigate such a claimant and to discourage such illegal acts or omissions.

[67] The remedy to a claimant who suffers as a result of the negligent act of a defendant lies in an award of damages. The purpose is to provide monetary compensation as far as it is possible, in order to make good the harm which has been occasioned to the sufferer. However, it is not intended to be punitive and still less a reward. (See *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 1 MLRA 154; [1983] 2 MLJ 324).

[68] In determining the appropriate quantum, the courts have been guided by precedents in comparable cases. The amounts awarded in past cases, which bear reasonable comparison with the case under review, would serve as useful guides. (See *United Plywood And Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 1 MLRA 57; [1970] 2 MLJ 237). In this regard, the Revised Compendium of Personal Injury Awards revised by the Malaysian Bar Council as at 6 July 2018 serves as a very useful guide on the range of damages to be awarded in personal injury claims.

[69] Having said that, unless the award is inordinately low or manifestly excessive, an appellate court would be slow to interfere with the award of a trial judge. I shall now deal with the awards appealed against.

[70] The defendant's submission on his appeal on quantum and in answer to the plaintiff's cross-appeal on quantum is only on two heads. One is that the learned trial judge had erred on both facts and law in allowing an award for loss of future earnings of RM192,000 although there is conflicting or no credible evidence that the plaintiff was working at all at the time of the accident and two, that the 1/3rd deduction of the monthly income of the plaintiff from the loss of income, if any, ought to be maintained.

[71] The plaintiff on the other hand submitted that the learned trial judge had erred in awarding only RM192,000 by using a multiplicand of only RM1,000 per month for 12 years multiplied by 16 years when the trial judge ought to have allowed RM2,000 per month out of the RM2,500 that the plaintiff was said to be earning monthly and, therefore, the plaintiff ought to be allowed a sum of RM324,000 for loss of future earnings.

[72] The plaintiff submitted that he had suffered very serious injuries to his right leg and foot which has yet to heal, is dirty and chronically infected with him continuing to suffer from a residual ulcer in his right foot and his joint stiffness is permanent with stiffness to all the toes of the right foot. Further, in the event the prospective bone grafting operation with llizarov external fixation to this right leg is unsuccessful, the plaintiff will have to have his right leg below his knee amputated. There will, therefore, be a complete loss of earnings for at least a year from the month of November 2019 until November 2020 and by reason of all these, the learned trial judge ought not to deduct 1/3rd per month against personal expenses such as food, handphone bills and the like for which there was no proof that they were being incurred. The 1/3rd deduction will amount to there being a double reduction. The plaintiff seeks a sum of RM72,500 as the actual loss of income instead of the RM28,333.30 that was awarded.

[73] From the aforesaid, it is clear that the following heads of claim for general damages by the learned trial judge are not in dispute:

(i) cerebral concussion: RM5,000;

(ii) open fracture distal right tibia and segmental right fibula: RM38,000;

(iii open fracture dislocation right first tarsometatarsal joint with medial cuneiform bone loss: RM12,000;

(iv) open fracture right navicular bone with bone loss: RM14,000;

(v) open fracture right fourth metatarsal bone and bone fracture shaft of right fifth metatarsal bone: RM20,000;

(vi) open fracture of the right intermediate cuneiform bone: RM12,000;

(vii) multiple degloving wounds including degloving wounds over interior aspect of right foot with total dorsalis pedis artery cut and multiple tendon, muscles and nerve cut and skin loss, and degloving wounds over intermedial aspect of right leg with anterior tibialis tendon, extensor hallucis tendon total cut and skin loss: RM30,000;

(viii) multiple ligaments injury over right foot: RM15,000;

(ix) ulcer wounds and scarring over right leg and right foot: RM15,000;

(x) muscle wasting of right lower limb: RM3,000;

(xi) bone grafting: RM7,000;

(xii) pain and suffering for future surgery: RM5,000 (without interest); and

(xiii) total award with a reduction of 10% for items (ii) to (vi) above = RM166,400.

[74] Only the following special damages and expenses were allowed by the learned trial judge:

(i) costs for transport to and fro by the plaintiff's family to visit the plaintiff in the Teluk Intan Hospital: RM200;

(ii) costs for undergoing treatment and follow up visits at the Teluk Intan Hospital: RM300;

(iii) costs for medical treatment: RM472;

(iv) anticipated medical treatment and operation: RM33,333; and

(v) total award for special damages: RM34,305.

[75] A sum of RM28,333.30 for loss of actual income and another sum of RM192,000 for loss of future earnings were also awarded. When these two sums for loss of income and special damages are added up it comes up to RM220,333.30 and when this sum is added to the special damages of RM34,305 it comes up to RM254,305.

[76] Interest on the special damages at 2.5% per annum from the date of the accident until the date of judgment and interest at 5% per annum on the general damages from date of service of writ of summons until the date of judgment and 5% per annum on the judgment debt from the date of judgment until full payment were awarded. At 70% of liability of (RM166,400 (for personal injuries including pain and suffering) plus RM254,638.60 (for loss of actual income and future earnings plus special damages) totalling RM421,038.60), the judgment debt favouring the plaintiff was RM294,727.02, (see the sealed judgment in encl. 10, p. 2).

Court's Analysis On (i) The Claim For Loss Of Future Earnings And (ii) 1/3rd Deduction For Actual Loss Of Income

(i) Claim For Loss Of Future Earnings

[77] In his grounds of judgment (encl. 10, p. 19, para. 6), the learned trial judge had accepted without undertaking an analysis of the evidence that the plaintiff was working with AYN D Touch as a general worker carrying out works to fix and decorate wedding dais, set up tents that required much physical movements and to move from one place to another quickly. In the circumstances, in this aspect, this is a non-speaking judgment requiring this court to endeavour to make its own findings of fact, based on the evidence on record, see *Hong Yik Plastics (M) Sdn Bhd v. Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 4 CLJ 479 CA at para. 23.

[78] With due respect, the learned trial judge was taken up by the medical condition of the plaintiff after the accident and with what he could see of the plaintiff when the latter attended court.

[79] This court then perused the witness statement tendered by the plaintiff (encl. 5, p. 27, Q&A 16), the salary slips for four months from 1 April 2018 to 1 July 2018 (encl. 6, pp. 71 and 72) purporting to show that the plaintiff was earning RM2,500 per month comprising a basic pay of RM2,300 and RM200 as an allowance, the cross-examination of the plaintiff (encl. 10, pp. 79 to 97) and his re-examination (encl. 10, p. 102) on this aspect, the witness statement of the plaintiff's alleged employer, PW3, Muhammad Asror bin Bukhari, (encl. 5, pp. 29 to 31) on the alleged salary paid, his cross-examination (encl. 5, pp. 105 to 119), his re-examination (encl. 5, pp. 119 to 123) and the written submissions of the plaintiff (encl. 5, pp. 68 to 76), the defendant's submissions (encl. 5, pp. 124 to 127) the submissions-in-reply of the plaintiff (encl. 5, p. 86) and the submissions in reply of the defendant (encl. 5, pp. 142 to 146).

[80] Having perused the aforesaid materials and in particular the evidence on record, this court is of the view that the ground of appeal set out in the defendant's memorandum of appeal (encl. 4, p. 10) that the learned trial judge had erred in both fact and law in awarding loss of future earnings of RM192,000 although there is inconsistent and no credible evidence led by the plaintiff is well made out.

[81] The starting point for assessment of damages for personal injury is, of course, s. 28A of the Civil Law Act 1956, which provides as follows:

> s. 28A. Damages in respect of personal injury
>
> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
>
> (b) any pension or gratuity, which has been or will or may be paid as result of the personal injury; or
>
> (c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.
>
> (2) In assessing damages under this section:
>
> (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

A (b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

B (c) in awarding damages for *loss of future earnings* the Court shall take into account:

(i) that in the case of a plaintiff who has attained the age of sixty years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, *damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff and was receiving earnings by his own labour or other gainful activity before he was injured*;

C

(ii) *only the amount relating to his earnings as aforesaid at the time when he was injured* and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

D

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

E (d) in assessing damages for loss of future earnings the Court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

F

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty-nine years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 60, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2. (emphasis added)

G **[82]** In determining loss of future earnings, the court is guided and bound by the principle laid down by the Federal Court in *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294; [1985] 1 MLJ 30 that there must be evidence of a real and substantial loss which must not be remote and speculative. The Court of Appeal in *Sumarni v. Yow Bing* H *Kwong & Anor* [2008] 3 CLJ 489; [2008] 1 MLJ 608 decided that:

> [10] For loss of future earnings, it is a post-trial loss. It was decided by the Federal Court in *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163, [1984] 1 CLJ (Rep) 294 that "Future loss of earnings or loss of prospective earnings are awarded for real assessable loss ie, loss that is I capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation ... *there must be evidence of a real and substantial loss which must not be remote and speculative".*

[11] *This aside, this court's decision in Looi Gnan Peng v. Bay Tong Hai [2005] CLJ 685, demands that all "elements" in s. 28A of the Act should be proved.* …

… The rational of the Federal Court in *Marappan Nallan Koundar & Anor v. Siti Rahmah bte Ibrahim* (*supra*) is misapplied. The plaintiff cannot justify non-compliance of a statutory prerequisite simply because there is an objection raised by the defendant that there is no proof that it was complied with by the plaintiff. *Legislation demands that the plaintiff must fulfill certain prerequisites before she can be successful in her claim for loss of future earnings and failure to fulfill these are fatal to the plaintiff's claim.* Here, obviously, the plaintiff has failed to tender any evidence to show her overall health condition but for the injury and is attempting to reverse the burden of proving this onto the defendant for raising it. This approach not only lacks merit but also goes against fundamental principles of law. This must be rejected.

[14] Apart from the need to prove that she was in good health, *the plaintiff must also show* that it was "but for the injury and *that he (she) was receiving earnings by his (her) own labour or other gainful activity before he (she) was injured*". In respect of the latter ie, was receiving earnings by her own labour or other gainful activity before she was injured, I think the plaintiff has successfully satisfied this. But in respect of the former ie, "but for the injury", there must be evidence to show that but for the injury she is not able to earn in the future. This qualification of not being able to earn in the future must be read as a consequence to "but for the injury" to give full effect to s. 28A(2)(c) of the Act which is basically intended to cater for loss of future earnings as a result of personal injury. So even if the plaintiff has proved that she was in good health but for the injury, she still has to prove that because of this she is not able to earn in the future. On this requirement, *case law demands that there must be evidence of real substantial assessable loss ie, loss that is capable of assessment at the date of trial, and this must be proved by evidence, not by mere speculation and it should not be remote – Ngooi Ku Siong & Anor. v. Aidi Abdullah* (*supra*).

(emphasis added)

[83] On the evidence that was produced, it is clear that:

(i) The plaintiff (PW2) could not answer whether he had any familial relationship with his employer (encl. 10, p. 81); had difficulties in remembering the name of his employer who was the one and only other person working together with him. In the notes of evidence, during cross-examination (encl. 10, p. 82) he said as follows:

KGW:	**Berapa boss yang ada di kedai itu?**	
SP2:	**Satulah**	
KGW:	**Satu? Siapa dia?**	
SP2:	**Saya lupalah nama**	
SP2:	Lupa saya, dia punya name.	
KGW:	Lupa nama?	
SP2:	Ya.	(emphasis added)

(ii) In his police report (encl. 6, p. 16) made on 17 August 2018, the plaintiff said he worked in a "bengkel" (workshop) but under cross-examination (encl. 10, pp. 84 to 91), he could not make up his mind as to whether he worked in a workshop, a "stor" (store); a "kedai" (shop) or a "gerai" (stall). He said that the size of the alleged store is about half and then changed his mind to be a quarter the size of the court-room. He also had difficulties with where is the location of this workshop/store/shop/stall that he worked in. This inconsistency is compounded by him later saying that the place he worked in is located near the shop of his employer, suggesting there are two different places, and the shop turned out to be a lot provided by the local council. He vacillated on the location of the store to be near the shop or within the shop (encl. 10, p. 90). His alleged employer, (PW3) later testified that the store is half the size of the court-room and the store is in his house! (encl. 10, p. 111);

KGW: **Dan stor ini berada di mana?** Kedudukan stor ini berada di mana? Kawasan stor ini di mana kawasannya?

SP2: Dekat kedai lah

KGW: Dekat kedai? Saya difahamkan tempat perniagaan ini adalah gerai majlis perbandaran

SP2: Yelah

KGW: Stor dekat mana?

SP3: Stor dekat rumah (emphasis added)

(iii) when pressed on the contents of the alleged store of indeterminate location, he testified that there are tents, wedding dais and related materials (encl. 10, p. 88) but his alleged employer testified that in his shop he has only about ten pieces of wedding dress (encl. 10, p. 109 and 110). In fact, the learned trial judge had occasion to comment that "Nanti pusing-pusing saya tak dapat jawapan".

(iv) As for his alleged salary of RM2,500 said to be proved as per the four pay-slips purportedly signed off by him at the part "employee's signature" (encl. 6, pp. 71 and 72), the plaintiff said *inter alia* (encl. 10, pp. 92 and 93) as follows under cross-examination:

KGW: Ok. Dia akan beri slip ini, dan kamu akan tandatangan?

SP2: Tak.

KGW: Tak tandatangan?

SP2: Slip tak terima.

KGW: Slip tak terima, jadi dia cuma bagi gaji sahajalah?

SP2: Ya.

KGW: Jadi kamu langsung tak diberi apa-apa slip gaji?

SP2: Tak ada.

KGW: Tuan, saya rujuk … ada dokumen ini? Warna hijau? Ada? Tengok mukasurat 17-17 ada? A

SP2: Ada.

KGW: Dan mukasurat 18? Tengok mukasurat 18 ya. Pernah dokumen ini?

SP2: Tak pernah. Pertama kali nampak kan? B

…

KGW: Tengok bawah ini. Ada tandatangan kamu?

SP2: Bukan. (emphasis added)

(v) On how his alleged monthly salary said to have to been paid to him, the plaintiff said it was by "cash lah" (encl. 10, p. 92) and he was not required to sign anything to show that he had been paid (encl. 10, pp. 92 and 93): C

KGW: Awal bulan dia bagi cash RM2,500. En. Ahmad tak sign apa-apa? D

SP2: Dia hanya …

KGW: Bukan. Salinan bukti oleh majikan kepada kamu untuk menyatakan bahawa kamu sudah terima gaji sebanyak RM2,500. Ini dia ada beri kamu …

SP2: **Dia hanya beri saya duit saja.** (emphasis added) E

(vi) On the next critical issue of where he keeps the cash, the plaintiff testified that he **banked it** (encl. 10, p. 94). He agreed that there will be bank records and if he goes to his bank, he will be able to get records that the money has gone into his bank account. He did not have the bank-in slips of his bank which he said was CIMB (encl. 10, p. 95) and he banked in parts of his salary for March, April, May and June in the region of about RM1,500 every month. **He agreed that he could obtain a copy of the bank statement and produce it** (encl. 10, p. 96): (emphasis added) F

KGW: **Jadi kamu boleh pergi ke bank pesan satu penyata untuk melihat duit dalam bank. Boleh?** G

SP2: **Boleh.**

KGW: **Dan kemukakan pada tarikh yang akan datang?**

SP2: **Uhuh.**

KGW: Sebab ini adalah bukti paling kukuh kamu memang terima duit. Faham saya? H

SP2: Ya.

KGW: **Itu adalah bukti yang Mahkamah nak. Faham ya?**

SP2: **Ya.** (emphasis added) I

(vii) As it turned out, the plaintiff did not produce his bank statement which he said he has.

(viii) Under cross-examination, the plaintiff's alleged employer, PW3, came with the story that he makes about RM7,000 a month. From this he drew RM2,000 for both his wife and him. He pays the plaintiff RM2,500 and adamantly maintained this story (encl. 10, p. 119) although it was put to him that it was incredible that he would pay his general worker more than both he and his wife (who was his "silent-partner") being the two employers combined (encl. 10, pp. 112 and 113):

KGW: Jadi keuntungan pendapatan kamu dan isteri 2 orang adalah kurang daripada gaji seorang pekerja?

SP2: Ya (emphasis added)

(ix) As it turned out during further cross-examination (encl. 10 pp. 113, 114, 116 and 117) PW3 said that he did not make any statutory contributions for the plaintiff towards the employees provident fund and SOCSO and neither did he have any income tax returns to show for the business under the name of ATYN D Touch 1290 which is said to be the plaintiff's employer. Although he admitted that he was obliged to inform the Lembaga Hasil Dalam Negeri of his income from AYTN D Touch, he testified that he did not.

(x) It was pointed out by the defendant in his submissions (encl. 5, p. 127) that the business entity of ATYN D Touch did not have the approval to run a business for the period of 10 January 2018 (encl. 6, p. 65) until 3 February 2019 (encl. 6, p. 68). This period coincided with the period that the plaintiff was alleged to be working for this business entity.

[84] From the above analysis of the evidence, this court finds that the story presented by the plaintiff that he was working for AYTN D Touch at a salary of RM2,500 to be incredible. The plaintiff could have easily presented his bank statement, which he said he could, to prove that he had been receiving payments but he did not. An adverse inference ought to have been drawn against him by the trial judge pursuant to s. 114(g) of the Evidence Act 1950 which is reproduced below:

> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume:

…

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

(emphasis added)

[85] There is a plethora of authorities on the application of s. 114(g) of the Evidence Act 1950 and it would suffice if the court were to cite one recent Court of Appeal authority of *Kumpulan Prasarana Rakyat Johor Sdn Bhd v. Emercon Bina Sdn Bhd* [2020] 1 LNS 1299 which held as follows:

> The learned JC in our view had correctly invoked the adverse inference under section 114(g) Evidence Act 1950 that the evidence by Dato Amirullah, if tendered, would be adverse or unfavourable against the defendant (*Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1). To refrain calling a material and important witness who was available and could be contacted, tantamount to a suppression of material and important evidence.

[86] The learned trial judge ought to have in the circumstances, invoked an adverse inference against the plaintiff that if the bank statement or statements of the plaintiff had been tendered, it would be adverse or unfavourable against the plaintiff in that the statement or statements would show that there were no such payments made to him.

[87] With respect, the learned trial judge: (i) misdirected himself on the evidence; (ii) failed to judicially appreciate the evidence; (iii) failed to consider material evidence; (iv) was probably unduly swayed by the medical condition presented by the plaintiff in court which is irrelevant on the issue of whether the plaintiff was in fact gainfully employed as to render the decision wholly erroneous; and (vi) misapprehended the facts and by reason thereto, appellate interference is warranted. Based upon the evidence and the adverse inference that ought to have been drawn, this court finds that there was no credible evidence produced to prove that the plaintiff was receiving earnings by his own labour or other gainful activity before he was injured as is statutorily required pursuant to s. 28A(2)(c)(i) and (ii) of the Civil Law Act 1956.

[88] Accordingly, the award on loss of future earnings is set aside altogether. The loss for actual income would have been set aside as well save that there was no appeal against this specific award, see *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153 FC.

[89] As for the loss in earning capacity, the court agrees with the submissions of the defendant that based upon the medical reports produced (encl. 6, p. 57 produced by the plaintiff and p. 80 produced by the defendant), on the evidence that obtained at the trial with rather similar follow-up treatment having been recommended, there is no mention that the plaintiff cannot work if the recommended follow-up treatment is undertaken.

[90] The Court of Appeal in *Sumarni v. Yow Bing Kwong & Anor* (*supra*) also decided that:

> From what is disclosed of her medical condition, she is not totally immobile or suffering from some severe permanent impairment that would restrict her movement to the extent that she can neither work nor is forced to seek a job that pays her less than what she was receiving before the accident. Without reasonable certainty as to her inability to secure a job in the future or that she would be receiving less than what she got before the accident, this claim by the plaintiff for loss of future earnings must fail.

[91] With this court having found that there was no evidence of a real and substantial loss as required by s. 28A(2)(c)(i) and (ii) of the Civil Law Act 1956 and premised upon the Federal Court authority of *Ngooi Ku Siong & Anor v. Aidi Abdullah* (*supra*), this court is obliged to hold that this claim for loss of earning capacity must similarly fail.

(ii) 1/3rd Deduction For Actual Loss Of Income

[92] With this court having found that the plaintiff was not receiving earnings by his own labour or other gainful activity before he was injured at the time of the accident, there should not have been any award at all for loss of actual income and a claim for the same is an abuse of process of court. However, as there was no appeal by the defendant against the award for loss of actual income, this court will not disturb this part of the award.

Conclusion

[93] On the issue of liability, the court denied the plaintiff his full entitlement to 70% liability on the part of the defendant for the reasons aforesaid. Accordingly, the defendant's appeal was allowed, with the decision of the Sessions Court varied with liability to be apportioned as between defendant and plaintiff at 40:60.

[94] On the issue of quantum, the defendant's appeal against loss of future earnings was allowed and the decision by the Sessions Court on this award was set aside.

[95] On the issue of both liability and quantum, the plaintiff's cross-appeal was dismissed.

[96] With the defendant having succeeded substantially in his appeal as well as against the plaintiff's cross-appeal, the decision of costs by the Sessions Court was set aside with costs of this appeal by the defendant and the cross-appeal by the plaintiff to be borne by the plaintiff. For the avoidance of any doubt, there is no order for costs in the court below.

[97] The court would conclude that in a running down action, the plaintiff who at the time of the accident had no riding licence, no road tax and in particular, no policy of insurance against third party risks ought not to be entitled to relief, in whole or in part as may be determined by the court based upon the considerations that obtain in the *Patel v. Mirza* test. And, in the circumstances that obtained in this case, this court denied the plaintiff a further 30% of what he would have been entitled to.

[98] After hearing parties on costs, the court awarded RM10,000 subject to allocatur to the defendant to be paid by the plaintiff.